AGORA, DIGNITY, AND DISCRIMINATION: ON THE CONSTITUTIONAL SHORTCOMINGS OF "CONSCIENCE" LAWS THAT PROMOTE INEQUALITY IN THE PUBLIC MARKETPLACE

by
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In the immediate wake of Obergefell*, some states began to consider enacting new "religious conscience" laws that would legally excuse refusals of service to LGBT persons. The broadest of these proposed statutes, such as Mississippi's House Bill 1523 (H.B. 1523), would create a near-absolute right for businesses open to the general public to discriminate against sexual minorities and transgender persons. This Essay considers the constitutional status of such laws and posits that they stand on dubious constitutional ground. First, enactments of this sort violate the Equal Protection Clause of the Fourteenth Amendment by denying otherwise applicable legal protections to LGBT persons. Second, individuals and businesses that rely on these new enactments in order to discriminate against LGBT customers are arguably state actors when acting consistently with the state's encouragement under the "nexus" theory of state action and, accordingly, accountable under the Equal Protection Clause. Third, and finally, even if such enactments are constitutionally valid, government may not provide any targeted support to individuals or businesses that operate on a pervasively discriminatory basis against LGBT persons.*

On the other hand, however, some states have moved in the opposite direction, enacting very broadly crafted anti-discrimination laws that require entities generally open to the public to refrain from discriminating

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against LGBT persons. Difficult questions exist regarding the permissible scope of such enactments. Just as government may not encourage private businesses to discriminate, it may not regulate religious entities in the same way it may regulate supermarkets and gas stations. A church, synagogue, or mosque stands outside the public marketplace, or agora, and has a right to maintain and enforce policies that reflect the tenets of the faith. Just as the government may not encourage businesses open to the public to discriminate in ways that would be unlawful if enacted as a direct social regulation, government may not require private religious communities to treat believers and non-believers on equal terms.

The Essay posits that in order to determine when religious entities have a right to be self-governing, we must carefully disentangle the public sphere from the private sphere. The state creates and maintains the agora, or public marketplace, and has the power to regulate access to it in order to promote the health, safety, welfare, and morals of the community. Just as the state may legislate to prevent and deter health nuisances, such as fire hazards and unsanitary conditions, it may also legislate to eradicate moral nuisances, such as various forms of invidious discrimination. This power to eradicate moral nuisances, however, cannot sweep so broadly or deeply as to deny self-constituted communities of faith the ability to hold and practice the tenets of their faith outside the public marketplace. To be sure, drawing the line of demarcation between the truly public and the truly private will not be an easy undertaking. Even so, however, it is an essential undertaking if we are to secure both equality and religious liberty in the contemporary United States.

I. INTRODUCTION

In June 2015, the Supreme Court issued its landmark decision in *Obergefell* v. *Hodges*,[1] which required all states to recognize both same sex

[1] 135 S. Ct. 2584 (2015).

marriages and the equal dignity of families headed by same-sex couples. In reaching this conclusion, Justice Kennedy explained:

> Excluding same-sex couples from marriage . . . conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.[2]

In other words, state governments denying same-sex couples the right to marry imposed a dignitarian harm on such couples—and on their children as well. "Stigma" and "humiliation" imposed by the government, in the context of the denial of a fundamental constitutional right, constitute grave constitutional harms.[3] To avoid the imposition of these harms, "same-sex couples may exercise the fundamental right to marry in all States."[4]

In sum, *Obergefell* squarely holds that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liber-

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[2] *Id.* at 2600–01.

[3] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984) (characterizing the discriminatory denial of access to a place of public accommodation as a serious and "stigmatizing injury," an injury that "is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race"). *Roberts* stands for the proposition that the stigmatizing harm of denials of service is not limited to racially based denials of service. There is no good reason to view discrimination based on sexual orientation or transgender status as any less socially harmful than denials on account of sex, religion, or race. Indeed, it would be quite possible to renormalize discrimination against LGBT persons as constituting a subset of sex-based discrimination. The EEOC has adopted this position. *See What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, EEOC, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited Dec. 19, 2016) ("While Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases, the Commission, consistent with Supreme Court case law holding that employment actions motivated by gender stereotyping are unlawful sex discrimination and other court decisions, interprets the statute's sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity."). The EEOC's position enjoys some support in relevant Supreme Court precedent. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–82 (1998); *see also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994). Professor Koppelman, who arguably pioneered this argument, appears to have the verdict of history on his side.

[4] *Obergefell*, 135 S. Ct. at 2607.

ty."[5] The same-sex couples challenging state bans against recognition of same-sex marriage sought nothing more than "equal dignity in the eyes of the law" and "[t]he Constitution grants them that right."[6] As Justice Kennedy explained, "[i]t follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."[7]

In the wake of *Obergefell*, religious conservatives and their political allies have successfully sought the enactment of a raft of new "religious liberty" laws by state legislatures.[8] Political controversy has followed in the wake of these legislative proposals because, if enacted into law, these bills would directly encourage local privately owned businesses to refuse service to same-sex couples if the owners possess religious, or in some cases merely "moral" objections to providing a particular good or service to LGBT persons.[9] Given the timing of the push to enact such laws—the movement did not arise until after some states began to recognize same-sex marriages—their proponents would be very hard pressed to deny that the purpose and effect of these statutes is to privilege denials of service to sexual minorities and transgender persons. Not simply to privilege such denials, but to do so selectively and notwithstanding the fact that the business refusing service is not operated by a church or a religious organization, is entirely secular in nature and plainly lacks a self-evident religious purpose or character, is otherwise open to the general public, and purports to serve members of the general public.[10]

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[5] *Id.* at 2604.

[6] *Id.* at 2608.

[7] *Id.* at 2607–08.

[8] *See* James M. Oleske, Jr., *"State Inaction," Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1, 4 n.4, 10–11 nn.29–30 (2016) [hereinafter Oleske, *State Inaction*]; *see also* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2522 (2015) (noting that religious conservatives have been advocating measures that protect against "complicity" with behaviors or practices that religious conservatives oppose and describing these legislative efforts as "a locus of mobilized political action seeking law reform designed to preserve traditional sexual morality").

[9] The broadest bills, such as Mississippi's House Bill 1523 and Missouri's Senate Joint Resolution 39, seek to legally privilege refusals of service premised on either objections to same-sex marriage or to sexual activity outside the context of a heterosexual married couple. *See infra* notes 11 & 12 and accompanying text. More narrowly targeted "conscience" or "complicity" laws are limited in scope to religious or moral objections to weddings by same-sex couples or couples that include a transgender person. *See* NeJaime & Siegel, *supra* note 8, at 2542–52, 2558–65. It also bears noting that many states have adopted "conscience" laws that excuse medical care providers and pharmacists from providing birth control or abortion-related services. *See id.* at 2554–58.

[10] Interestingly, states did not respond to *Loving v. Virginia*, 388 U.S. 1 (1967), by rushing to enact laws to protect the ability of private businesses to refuse to provide

State legislatures sometimes craft these so-called "conscience" laws with a remarkable potential scope of application.[11] Mississippi's House Bill 1523 ("H.B. 1523"), arguably the broadest of these so-called "conscience" laws to achieve enactment into law, appears to authorize refusals of service based on any kind of religious or moral belief that involves antipathy toward LGBT persons.[12] The effect of such laws would appear to

services to interracial couples based on religious or moral objections to interracial marriages. *See* James M. Oleske Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 106–10, 116–17 (2015) [hereinafter Oleske, *Unequal Treatment*] (observing that neither Congress nor state governments sought to protect religiously motivated objectors to interracial marriage post-*Loving* and noting the utter paucity of contemporary academic support for the enactment of such laws); *see also* Oleske, *State Inaction*, *supra* note 8, at 38 (arguing that the normative arguments for providing "conscience" exemptions that facilitate private discrimination based on sexual orientation or transgender status are not self-evidently any different, or any stronger, than the arguments that were rejected in the 1960s with respect to enacting "conscience" exemptions that facilitated racial discrimination). As Professor Oleske cogently has observed, "although arguments can be made that religious objections to same-sex marriage are more defensible than religious objections to interracial marriage, those arguments are not nearly strong enough to explain why the type of broad exemptions from anti-discrimination laws that were never even discussed in the academy for interracial-marriage objectors are now widely championed for same-sex marriage objectors." Oleske, *Unequal Treatment*, *supra*, at 124.

[11] *See, e.g.*, S.J. Res. No. 39, 98th Gen. Assemb., 2d Sess. (Mo. 2016). If enacted, Missouri's Senate Joint Resolution 39 would have placed a constitutional amendment on the November 2016 ballot that, among other things, would have provided complete legal immunity for denials of service to LGBT persons. *See id.* at § A (proposing a new amendment to Missouri's state constitution, section 36, which, if ratified by the voters, would, via section 36(2)(6), prevent the state government from "recogniz[ing] or allow[ing] an administrative charge or civil claim against a religious organization or individual" that refuses service to LGBT persons); *id.* (providing in section 36(6)(1) that "[a] religious organization or individual may assert an actual or threatened violation of this section as a claim or defense in a judicial or administrative proceeding, or other hearing or dispute resolution process"). Missouri's Senate Joint Resolution 39 passed Missouri's state senate but died in a house committee during the 2016 legislative session. *See* Jack Suntrup, *Religious Freedom Measure Defeated in Committee*, ST. LOUIS POST-DISPATCH (Apr. 28, 2016), http://www.stltoday.com/news/local/govt-and-politics/religious-freedom-measure-defeated-in-committee/article_2850451b-eae2-576b-9df3-457a616bd8f9.html (reporting that Mo. S.J. Res. 39 "was defeated on a 6-to-6 vote" in a house committee). Like H.B. 1523 in Mississippi, which was enacted into law, S.J. Res. 39 sought to create a general license for business owners to engage in targeted discrimination against sexual minorities and transgender persons. *See infra* note 12 and accompanying text (discussing Miss. H.B. 1523).

[12] The "Protecting Freedom of Conscience from Government Discrimination Act" would have taken effect on July 1, 2016. H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016) § 1, § 13. However, on June 30, 2016, a federal district court enjoined the state from enforcing it on both Equal Protection Clause and Establishment Clause grounds. Barber v. Bryant, No. 3:16-CV-417-CWR-LRA, 2016 U.S. Dist. LEXIS 86120,

be to create a legal shield against any otherwise applicable state statutes or common law rules that might create legal liability for denials of service to sexual minorities and transgender persons.[13] For example, a "conscience" law like H.B. 1523 would presumably prevent a lesbian couple from suing a photographer who breaches a contract to photograph their wedding to obtain compensatory damages.[14] It would also, in theory, preclude breach of contract claims wholly unrelated to a wedding ceremony itself—for example, a refusal by a plumber to unclog a blocked drain in a lesbian couple's kitchen. So long as the refusal of service relates to a religious or moral objection to same-sex marriage, an exception from otherwise-applicable general state laws would apply.

In this Essay, I posit that the new wave of religious accommodation laws are motivated by animus toward LGBT persons and will clearly produce discriminatory effects. Laws of this kind, which encourage and facilitate targeted discrimination against sexual minorities and transgender

at *54, 79 (S.D. Miss. June 30, 2016); *see also* Campbell Robertson, *Mississippi Law Protecting Opponents of Gay Marriage Is Blocked*, N.Y. TIMES (July 1, 2016), http://nyti.ms/29fj2Ae. Gov. Phil Bryant (R-MS) has promised to mount "an aggressive appeal" of this ruling. *Id.* On its face, H.B. 1523 prohibits a private business owner from being subjected to "discriminatory action" by the state if the business owner acts upon "a sincerely held religious belief or moral conviction" to deny services to LGBT persons based on their sexual orientation or transgender status. H.B. 1523 at §§ 3–4. In turn, the statute defines "discriminatory action" as including the state "[i]mpos[ing], levy[ing] or assess[ing] a monetary fine, fee, penalty or injunction." *Id.* at § 4(1)(e). Accordingly, H.B. 1523 would seem to preclude a state court from ordering compensatory damages for breach of contract or in any other way providing an effective remedy to LGBT persons denied goods or services by a Mississippi business. Section 5 resolves any residual doubts about the remarkably broad scope of this statute: "A person may assert a violation of this act as a claim against the state government in any judicial or administrative proceeding *or as defense in any judicial or administrative proceeding without regard to whether the proceeding is brought by or in the name of the state government, any private person or any other party*." *Id.* at § 5(1) (emphasis added). H.B. 1523 would therefore seem to turn off the law of contracts for LGBT persons: not only for those with religious objections to same-sex families, but also with respect to any business owner who claims a "moral" objection to serving such customers as well.

[13] For an illustrative list of these so-called "conscience" proposals, see Oleske, *State Inaction*, *supra* note 8, at 4 n.4. (listing proposals similar to H.B. 1523 pending or enacted in over a half dozen additional states).

[14] In this respect, the "conscience" laws appear to be seriously vulnerable to attack on the same grounds as Colorado's Amendment 2, which left anti-discrimination rules in place for all groups except sexual minorities and, indeed, did not generally restrict home rule powers with respect to anti-discrimination polices except for sexual orientation. *See* Romer v. Evans, 517 U.S. 620, 632–34 (1996) (invalidating Colorado's Amendment 2 because it "impos[ed] a broad and undifferentiated disability on a single named group," was "born of animosity toward the class of persons affected," and, accordingly, failed to advance a permissible legitimate government interest).

persons, are unconstitutional on equal protection grounds.[15] Just as the states themselves, after *Obergefell*, cannot directly discriminate against sexual minorities, they also may not attempt to achieve indirectly that which they may not command directly.[16] Moreover, *Palmore v. Sidoti* teaches this lesson: government may not ratify, and by ratifying extend, private social prejudice.[17]

[15] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *see also Romer*, 517 U.S. at 632 (invalidating Amendment 2, a Colorado constitutional amendment that abolished anti-discrimination protections for sexual minorities, because "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation" and because Amendment 2's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects"). As Justice Anthony Kennedy explained in *Romer*, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633. It bears noting that the new state "conscience" laws have precisely this effect. *See infra* Part II.

[16] *See* Norwood v. Harrison, 413 U.S. 455, 463–66 (1973).

[17] 466 U.S. 429, 433 (1984). ("The Constitution cannot control such [private racial] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). To be clear, I do not take a position on the larger issue of state mini-RFRAs—Religious Freedom Restoration Acts—that provide generic exemptions from neutral laws of general applicability but which were not self-evidently enacted with a discriminatory purpose and which, in most of their applications, do not regularly produce discriminatory effects against any specific minority group. There are, of course, many difficult questions of law and policy that remain to be worked out regarding both the federal RFRA and state mini-RFRAs. In the wake of *Hobby Lobby*, for example, whether publicly traded corporations may claim the benefit of RFRA-type enactments is an important and difficult question. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 (2014). This is so because to recognize an employer's right to maintain religiously motivated practices in the workplace creates the prospect of a square conflict of religious values between a corporation's leadership and board and its individual employees. To state the problem more directly, may a publicly traded corporation maintain religiously motivated practices that significantly burden the rights of conscience of its employees? For, if corporations enjoy rights under RFRA-type laws, the exercise of these rights is quite likely to burden the rights of employees to avoid having their rights of conscience unduly burdened. To give a concrete example, could a Roman Catholic business owner insist on placing devotional statues of the Virgin Mary in all workspaces? Even if doing so offends the religious sensibilities of employees who happen to be Jehovah's Witnesses? And, in the event of a conflict of religious values between management and a corporation's employees, precisely whose religious values will triumph? To say that ownership or managerial rank should be controlling would be to undo Title VII's protection against religious discrimination in the workplace. *See* 42 U.S.C. § 2000e–2(a) (2012). Indeed, by intentionally creating religiously offensive workspaces, a clever discriminator could effectively avoid having to employ persons associated with a particular faith or sect. My immediate focus in this Essay, however, is the constitutionality of post-*Obergefell*

Even if laws like H.B. 1523 are not unconstitutional because they intentionally facilitate private discrimination, a strong argument exists that individuals who act under the auspices of such laws are state actors. *Reitman v. Mulkey*[18] has been interpreted to hold that when the government encourages private actors to discriminate, and a nominally private party acts consistently with the government's invitation, it engages in state action under a theory of a nexus (or "state encouragement").[19] Thus, even if the new spate of state "conscience" laws are not themselves unconstitutional on Equal Protection Clause grounds, to the extent that these statutes encourage private discrimination against sexual minorities and transgender persons, a private business owner who invokes these statutes in order to discriminate may be held accountable under the Equal Protection Clause because the state has actively and directly encouraged the discriminatory behavior.[20]

Finally, even if the federal courts were to conclude that the new state "conscience" laws are neither facially unconstitutional nor transform private businesses that invoke them to justify discrimination into state actors, the state must disassociate itself from any business that engages in invidious forms of discrimination. Government may not offer any direct or targeted support to businesses that engage in discrimination that the Constitution prohibits with respect to the state itself. The Supreme Court, in *Norwood v. Harrison*, held that the Equal Protection Clause prohibits state government from offering targeted financial support to pervasively discriminatory institutions.[21] This rule should apply with full force with respect to any person or business enterprise that invokes a "conscience" law in order to discriminate against LGBT persons.[22]

There is, however, another side of the coin that merits careful and sustained consideration. Just as the government may not seek to affirmatively promote religiously-motivated private discrimination, it also may not seek to regulate faith communities with respect to their religious beliefs, doctrines, and rites.[23] Public accommodation laws may not be constitutionally applied in ways that burden the ability of self-constituted communities of faith to practice their religion outside the public's mar-

"conscience" laws that seek to immunize, from any form of legal liability, intentional discriminatory acts by businesses otherwise open to the public.

[18] 387 U.S. 369 (1967).

[19] *See infra* Part III.

[20] *See id.*

[21] 413 U.S. 455, 463–65 (1973).

[22] *See infra* Part V.

[23] *See* STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 27–28, 56–87 (1998) [hereinafter CARTER, DISSENT OF THE GOVERNED].

ket square.[24] The difficulty, of course, is drawing and maintaining the precise line that demarcates private religious belief from marketplace participation.[25]

This Essay will proceed in five Parts. Part II considers the difficult problem of defining the public and private spheres. It also examines the constitutional status of the recent spate of post-*Obergefell* religious freedom "conscience" laws that authorize private businesses to refuse service to sexual minorities and transgender persons and concludes that they are inconsistent with the central imperative of the Equal Protection Clause—namely, that government laws and policies motivated by animus, i.e., naked dislike of a particular minority group, lack any legitimate purpose.[26] Part III extends this argument by positing that even if such laws are not facially unconstitutional, when a person or enterprise acts consistently with the state's invitation to discriminate, the person or enterprise should be found to have engaged in state action—and therefore be subject to suit under the Equal Protection Clause.

Part IV looks at the problem from the other side of the coin: How far may government go in commanding non-discrimination within society generally? This Part argues that government regulations cannot regulate religious beliefs or rites, and also posits that government should refrain from regulating activities that directly relate to the core religious activities of a faith community (such as a K–12 school). On the other hand, comprehensive non-discrimination regulations are really no different in kind or scope from regulations proscribing maximum hours, minimum wages, and the provision of workers' compensation insurance. One could also analogize comprehensive anti-discrimination laws to regulations designed to prevent and punish public nuisances—like pollution, fire hazards, or unsanitary conditions—because discrimination constitutes a harm to the general public as well as to its direct victims.[27]

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[24] *See id.* at 27–32. Professor Carter posits that "[f]or religious communities in which ritual and activity are as important as belief, the old saw remains both accurate and valuable: We are what we do." *Id.* at 32.

[25] *See infra* Part IV.

[26] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

[27] In point of fact, the Supreme Court already has embraced an analogy between the social costs of discriminatory membership policies in large organizations that are effectively open to the public and acts of violence; neither is entitled to meaningful First Amendment protection. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) (observing that "like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such [discriminatory membership] practices are entitled to no constitutional protection"); *see also id.* at 634 (O'Connor, J., concurring in part and concurring in the judgment) ("The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex."). Moreover, because discrimination in places of public

Assuming the federal courts hold that the new "conscience" laws are, in fact, constitutional, Part V argues that government may not constitutionally lend targeted support to persons or entities that engage in pervasive forms of discrimination constitutionally prohibited by the government itself. Finally, Part VI offers a brief overview of my arguments and a conclusion.

The state creates and maintains the public marketplace—the agora.[28] It may constitutionally condition access to the public market square on a wide variety of regulations—regulations designed to protect the health, safety, and welfare of employees, of customers, and of the public more generally. Moreover, just as the state itself cannot create a kind of "Pink Triangle Jim Crow" by directly segregating places of public accommodation based on sexual orientation or transgender status,[29] it cannot indirectly achieve this result by encouraging private business owners to pervasively discriminate against sexual minorities.

II. DISENTANGLING THE PUBLIC AND PRIVATE IN THE CONTEXT OF CAESAR'S FORUM: THE NEW STATE "CONSCIENCE" LAWS SQUARELY VIOLATE THE EQUAL PROTECTION CLAUSE

To state my thesis simply, in the public marketplace, a dollar in one person's hand should be no less valid than a dollar in another person's hand. This rule does not relate to the difficulty of forcing members of unpopular minority groups to seek a good or service elsewhere. Some proponents of very broad schemes of religious accommodation, such as Professor Douglas Laycock, have attempted to frame questions of reli-

accommodation is a social evil that the government possesses the power to prevent, a law that impedes such conduct is by definition narrowly tailored to achieve a compelling government interest. To the extent that the law prevents discrimination, it directly advances the state's compelling interest in combating the social evil of discrimination.

[28] The agora was the public marketplace in Athens. By "agora" I mean the public marketplace, town square, or Caesar's forum. MABEL LANG, THE ATHENIAN CITIZEN: DEMOCRACY IN THE ATHENIAN AGORA 5 (rev. ed., 2004) ("Center of public activity, the Agora was a large open square where all the citizens could assemble. It was used for a variety of functions: markets, religious processions, athletic contests, military training, theatrical performances, and ostracisms."). *See generally* JOHN M. CAMP, THE ATHENIAN AGORA: EXCAVATIONS IN THE HEART OF CLASSICAL ATHENS (Colin Renfrew & Jeremy A. Sabloff eds., 1986) (providing a comprehensive social, political, and historical overview of the Athenian Agora, including treatment of its role and function as a central public marketplace).

[29] *See* Timothy Zick, *Bathroom Bills, the Free Speech Clause, and Transgender Equality*, 78 OHIO ST. L.J. (forthcoming 2017) (manuscript at 1, 17) (on file with author) (positing a First Amendment based challenge to N.C. Bill 2 but also observing that the most promising constitutional challenge "sounds in equal protection and/or due process" and, accordingly, that the federal courts are more likely to invalidate such laws based on "equal protection and due process concern[s]").

gious accommodations largely in terms of a business owner's rights of conscience versus the very mild inconvenience imposed on a would-be customer denied immediate access to a good or service.[30] However, this is simply not an apt framing, or adjustment, of the relative equities. The injury to a transgender person refused service at a bakery is not the loss of a cupcake or the time and trouble of locating another bakery; instead, it is the denial of basic human dignity that the refusal of service represents.

Separate but equal is, to paraphrase the majestic words of Chief Justice Earl Warren in *Brown*, intrinsically unequal because it demeans and degrades those denied a good or service on equal terms.[31] The denial of service—the targeted exclusion and rejection—is an offense to the dignity and equal personhood of the person refused service in a business otherwise holding itself open to any and all members of the public.[32] To miss this fundamental reality requires a kind of willful blindness that probably arises most easily if a person is not a member of any minority community (and, hence, unlikely to ever find himself on the receiving end of this kind of targeted assault on his dignity and personhood).[33]

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[30] DOUGLAS LAYCOCK, *Afterword* to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 198–201 (Douglas Laycock et al. eds., 2008) [hereinafter LAYCOCK, EMERGING CONFLICTS].

[31] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

[32] In this regard, it bears noting that the federal government and virtually *all* state governments generally prohibit discrimination by businesses open to the public on the basis of race or sex. *See* Oleske, *State Inaction*, *supra* note 8, at 45 n.155 ("Forty-eight states (all but Alabama and Mississippi) prohibit private employment discrimination on the basis of disability, while forty-seven states (all but Alabama, Georgia, and Mississippi) prohibit it on the basis of race, religion, national origin, and sex, and a slightly different forty-seven states (all but Arkansas, Mississippi, and South Dakota) prohibit it on the basis of age.").

[33] Professor Laycock's nonchalance about the dignitarian harm caused when businesses otherwise generally open to the public engage in direct and overt forms of discrimination is rather surprising: his commitment to securing the rights of religious believers seems to have led him to seriously understate, if not misstate, the effects of denials of service on minority persons. *See* LAYCOCK, EMERGING CONFLICTS, *supra* note 30, at 198–202. Professor Laycock states his position with striking clarity:

> In my view, the right to one's own moral integrity should generally trump the inconvenience of having to get the same service from another provider nearby. Requiring a merchant to perform services that violate his deeply held moral commitments is far more serious, different in kind and not just in degree, from mere inconvenience.

Id. at 198. I categorically disagree with this proposed weighing of the relative equities. Denying service, and perhaps posting a sign as a warning to unwanted gay or transgender customers to go elsewhere, *see id.* at 198–201, involves the merchant imposing harms on the community that are little different from nuisances that our laws routinely prohibit (such as pollution, unsanitary conditions, or fire hazards).

Laws like H.B. 1523 and North Carolina's equally discriminatory House Bill 2[34] present a conflict between our constitutional commitments to equal human dignity and religious freedom. In order to resolve the conflict correctly, we must create and maintain a workable distinction between the truly private and the truly public. Private religious beliefs and practices lie beyond the legitimate reach of the state's regulatory power.[35] On the other hand, a society that permits every person or self-constituted community of faith to be self-regulating in the name of conscience would quickly prove to be ungovernable.[36]

If we think carefully about the context in which a religious accommodation is sought, we can determine accurately whether it relates to private religious belief and practice—or reflects an attempt to evade general regulations of the market that apply with an even hand to all market participants in order to make the marketplace open and accessible. At the same time, however, we should also take care not to define the public

Moral hazards are not less harmful to the community because the harms they cause are psychic rather than physical in nature. One also wonders if academic support for "conscience" exemptions would run as strong for religionists who harbor openly racist, sexist, or anti-Semitic religious beliefs. *See* Oleske, *Unequal Treatment*, *supra* note 10, at 116–21; *see also* Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2069, 2087 (2011) (questioning the legal and moral logic of treating sexual orientation discrimination as less odious than other kinds of invidious discrimination, such as discrimination based on race, sex, religion, or national origin, and observing that "exemption proponents single out sexual orientation as the one trait or status that should be trumped by religious claims"). My strong suspicion is that this support would not run as strong—which, if true, lays bare the root assumption that undergirds many arguments for post-*Obergefell* "conscience" laws that legally privilege denials of service to LGBT persons: discrimination against LGBT persons is less socially opprobrious, and more understandable, if not fully justifiable, than other forms of invidious discrimination. Even if this is true as a matter of social fact (and I contest this proposition in the strongest possible terms), government may not act to ratify, and by ratifying extend, a hierarchy of noxious social prejudices. *See* Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984). As Professor Oleske has observed, "[t]he more fitting approach might well be to honor that original struggle for civil rights by giving full force to its lessons in other relevant areas." Oleske, *Unequal Treatment*, *supra* note 10, at 121.

[34] H.B. 2, §§ 1.2–1.3, 2d Extra Sess., Sess. Law 2016-3 (N.C. 2016). North Carolina House Bill 2 requires all persons in North Carolina to use public bathrooms in schools and public buildings that correspond to "their biological sex." *Id.* at § 1.2(b), § 1.3(b). Unlike Mississippi's H.B. 1523, however, North Carolina's House Bill 2 only regulates the use of bathrooms owned by public schools and other state and local government entities—it does not seek to encourage private businesses to organize cisgender patrols to undertake enforcement. In this sense, although North Carolina House Bill 2 appears to be unconstitutional because it is clearly the product of targeted animus toward transgender persons—*see, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)—it does not involve state efforts to encourage or facilitate private discrimination by non-state actors.

[35] *See* United States v. Ballard, 322 U.S. 78, 86–87 (1944).

[36] *See* Emp't Div. v. Smith, 494 U.S. 872, 879 (1990).

sphere too broadly—religious communities have a right to be self-defining and to limit their membership to individuals who share and practice the tenets of the faith.[37] What is more, some enterprises that could be seen as "public," such as religiously-identified K–12 schools,[38] probably should be classified as "private" for purposes of applying anti-discrimination laws.[39]

[37] *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 185–86 (2012) ("The right of assembly protects the members of a group based not upon their principles or politics but by virtue of their coming together in a way of life."); *see also* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 143 (1993) [hereinafter CARTER, CULTURE OF DISBELIEF] (arguing that "the central acts of faith of a religious community—the aspects that do the most to produce shared meaning within the corporate body of worship—are entitled to the highest solicitude by the courts"); William Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Law and Equality in American Public Law*, 106 YALE L.J. 2411, 2415 (1997) ("The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others.").

[38] 42 U.S.C. § 12181(7)(J) (2012).

[39] I should note that some "private" activity occurs in places open to the general public; my use of the terms "private" and "public" relates to the nature of the activity in question, rather than its locus. For example, some religious sects actively proselytize, and seek to gain new congregants through this activity. Consistent with this objective, many religious services are open to the public on a voluntary basis by faith communities seeking new converts. One could view such activities as "public" rather than "private" in character. This would be mistaken, however. The relevant dichotomy relates to the use of the public marketplace to buy and sell goods and services—or to solicit broad-based public support for organizations and causes—not merely spaces that are open to the public. Moreover, many religious activities take place in public spaces. Mormon missionaries, for example, travel the streets and sidewalks seeking new adherents to their faith. *See* THE OXFORD HANDBOOK OF MORMONISM 183–93 (Terry L. Givens & Philip L. Barlow, eds. 2015). However, Mormon missionaries are engaged in "private" activity—at least in the sense that I mean to use that term. The key distinguishing factor is that the faith community does not purport to accept any and all comers based solely on their ability to purchase a good or service, or subscribe to a membership. Membership in a faith community is always provisional and premised on the novitiate committing herself to accepting the sect's relevant teachings and living her life in a fashion consistent with those teachings. By way of contrast, a coffee stand proprietor does not generally require anything more from a would-be customer than the ability to pay the posted price. *But cf. Seinfeld, The Soup Nazi* (NBC Television Broadcast Nov. 2, 1995) (presenting a fictional Manhattan-based soup seller who uses idiosyncratic preferences to decide to whom he will sell his soup and thundering "Nothing for you!" or "No soup for you!" at trangressors); *see also* Al Brumley, *One Wrong Move with Soup Nazi and You're in Soup*, SAN DIEGO UNION TRIB., Jan. 7, 1996, at F5 (discussing the Soup Nazi's various foibles). Simply put, religious communities are more like the Soup Nazi than Amazon or Ebay; they do not purport to be open on equal terms to any and all comers and they maintain rigid, inflexible rules for those who seek full membership rights within the community.

At one end of the spectrum, then, is the government itself. However pervasive or widely held within society in general, the government itself may not rely on animus or naked prejudice as a basis for imposing a burden or withholding a benefit.[40] Nor may the government ratify—and by ratifying extend—existing social prejudices.[41] As Chief Justice Warren E. Burger explained in *Palmore*, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[42] Accordingly, the Equal Protection Clause of the Fourteenth Amendment and the equal protection principle implicit in the concept of ordered liberty under the Fifth Amendment,[43] preclude local, state, and the federal governments from adopting policies predicated on irrational forms of animus toward discrete and insular minorities.[44]

On the other hand, however, the First Amendment conveys substantial autonomy on individuals and organizations to hold beliefs that the government itself may not. Moreover, self-constituted communities, whether or not religious in character, have a constitutional right to determine with whom they will associate and assemble.[45] In the United States, government could not compel the Roman Catholic Church to ordain women as priests. Or require the Ku Klux Klan to admit African American women to membership. Even if an organization holds sexist, racist, or homophobic beliefs, and uses those beliefs to exclude others, the First Amendment privileges truly private entities from direct forms of government coercion.

The question, in my mind, becomes where to locate a law firm, a restaurant, or a bakery on the spectrum that lies between these two poles. Clearly, the federal courts will not directly apply constitutional antidiscrimination principles to a McDonald's fast food restaurant or a Hilton hotel. But, may a legislative body enact positive legislation that ex-

[40] *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding that "a bare congressional desire to harm a politically unpopular group" does not constitute a legitimate government interest and, accordingly, laws motivated by overt animus toward a particular minority group violate the Equal Protection Clause). Under this principle, a law animated by naked animus is irrational and, hence, unconstitutional. *See id.* at 538.

[41] *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such [private racial] prejudices but neither can it tolerate them.").

[42] *Id.*

[43] *See* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954); Korematsu v. United States, 323 U.S. 214, 219–20 (1944).

[44] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (observing that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

[45] *See* INAZU, *supra* note 37, at 174–86; *see also* N.Y. State Club Ass'n. v. City of New York, 487 U.S. 1, 12 (1988).

tends constitutional non-discrimination principles to such businesses? The question, until recently, seemed well settled: If an entity was open to the general public, it was subject to pervasive forms of non-discrimination regulation.[46] After all, no one's religion compels them to own and operate a McDonald's or a Jiffy Lube on a discriminatory basis.[47]

As Chief Justice Burger observed in *Roy*, the fact that a government regulation "confront[s] some applicants for benefits with choices" is irrelevant, provided that the regulation does not "affirmatively compel . . . by threat of sanctions" individuals "to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons."[48] In *Roy*, a would-be applicant for Social Security benefits claimed that obtaining and using a Social Security number would "'rob the spirit' of his daughter and prevent her from attaining spiritual power."[49] The Supreme Court squarely rejected a free exercise claim seeking to obtain benefits without using a Social Security number to obtain them: "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[50]

By parity of logic, anti-discrimination laws applicable to businesses open to the general public merely condition access to the public market on compliance with the anti-discrimination requirement—such laws simply do not force anyone to enter the public marketplace in the first place. Moreover, I am not familiar with any major religious sects that require adherents to operate businesses open to the general public, on a discriminatory basis, in order to obtain personal salvation.

To claim a direct, as opposed to indirect, burden on religiously motivated conduct, the claimant would have to assert that their religion requires them to operate a business open to the public on a discriminatory basis. The Supreme Court has been, quite properly, skeptical of claims of this sort.[51] Cases like *Roy* and *Jimmy Swaggart* make plain that government has no general obligation to exercise its police powers in ways that are

[46] *See N.Y. State Club Ass'n.*, 487 U.S. at 12 (noting that "in defining the nonprivate nature of these associations [dining clubs]" particular attention should be given to "the kind of role that strangers play in their ordinary existence" and that the failure to exclude non-members from regular use of ostensibly private dining clubs renders the clubs subject to government regulation as places of public accommodation).

[47] *See* Bowen v. Roy, 476 U.S. 693, 699–701 (1986).

[48] *Id.* at 703 (internal quotations and citations omitted).

[49] *Id.* at 696.

[50] *Id.* at 699.

[51] *See, e.g.*, Swaggart Ministries v. Bd. of Equal'n, 493 U.S. 378, 391 (1990) (observing that "[t]here is no evidence in this case that collection and payment of the tax violates appellant's sincere religious beliefs" and concluding that "appellant's religious beliefs do not forbid payment of the sales and use tax").

maximally congenial to persons who hold idiosyncratic religious beliefs that conflict with generally applicable health, safety, welfare, and morals regulations. So too, nominally private clubs that are, de facto, open to many non-members on a regular basis may be required to observe statutory non-discrimination rules.[52] Large, mass-membership organizations are also subject to such regulations,[53] unless they can show that discriminatory exclusion relates to a core purpose for the organization existing.[54]

In fact, the Supreme Court already has addressed, in some detail, the question of how to disentangle the public and private. In the 1980s, in the context of applying non-discrimination laws to organizations like the Jaycees and the Rotary Club, the Supreme Court found that the First Amendment creates a constitutional privilege for private organizations to exclude individuals based on their race, sex, religion, national origin, and sexual orientation.[55] However, to invoke successfully the First Amendment as a shield against the application of an anti-discrimination law, the organization must show that it is not generally open to the public and that its exclusionary membership practices are central to the organization's associational reasons for existing.[56] Thus, an entity that is generally open to the public, or that does not maintain discrimination as a core reason for its associational activities, cannot successfully deploy a First Amendment defense to block the application of a local, state, or federal anti-discrimination law that regulates places of public accommodation.[57] For organizations that are generally open to the public and which do not make promoting discrimination a core purpose, the government's compelling interest in preventing discrimination trumps the entity's interest in associational freedom.[58]

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[52] *See* N.Y. State Club Ass'n. v. City of New York, 487 U.S. 1, 12–13 (1988).

[53] In fact, the Supreme Court carefully distinguishes between intrinsically private, and intimate, associations such as marriage and family life, and relationships that "lack[ ] these qualities—such as a large business enterprise." Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984). Justice William J. Brennan, Jr., writing for the *Jaycees* majority, explained that the free association claims by commercial enterprises are "remote from the concerns giving rise to this constitutional protection" and "[a]ccordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." *Id.*

[54] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648–52 (2000).

[55] *See N.Y. State Club Ass'n.*, 487 U.S. at 13; Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544, 548 (1987); *Roberts*, 468 U.S. at 623.

[56] *Dale*, 530 U.S. at 658–61; *N.Y. State Club Ass'n.*, 487 U.S. at 13.

[57] *See N.Y. State Club Ass'n.*, 487 U.S. at 13–15; *Rotary Int'l*, 481 U.S. at 547–48.

[58] Caroline Mala Corbin, *Speech or Conduct?: The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 299 (2015) ("The state has not just an important interest but a compelling interest in ending discrimination."). Professor Corbin cogently argues that a targeted denial of service to LGBT persons "denies equal access to goods and services and it denies equal citizenship" and, moreover, "there is no other

If one considers carefully the relevant Supreme Court cases involving First Amendment-based challenges to local, state, and federal anti-discrimination laws, it becomes clear that participation in the public marketplace may be conditioned on refraining from discriminating based on invidious characteristics. An organization or entity cannot hold itself out as open to the public and, concurrently, invoke the First Amendment as a shield for targeted, discriminatory exclusions based on invidious forms of discrimination. In fact, government arguably lacks the ability to convey an exemption on enterprises that, as a general matter, are open to the general public.[59] As Professor Jim Oleske has argued, "courts should conclude that carving out exemptions from antidiscrimination laws so as to allow commercial business owners to refuse service to same-sex couples unconstitutionally deprives those couples of equal protection of the laws."[60]

Certainly, government has no constitutional obligation to relieve King & Spaulding or the Jaycees from obligations arising from laws proscribing discrimination. The rule obtains because participation in the public marketplace, and making goods and services available to the public, refutes the claim that the business entity exists to advance a limited associational bond between its members or a particular ideological vision.[61] If you sell groceries to the public, it's not really plausible to say that you exist to sell groceries only to men, Christians, or white people. Accordingly, attempting to say "we're open to those whom we choose to serve" does not generally wash as a means of facilitating invidious forms of discrimination against would-be customers.

To be sure, some counter examples do exist that feature a commercial enterprise, open to the public, that makes exclusions of potential customers a core part of its identity and business model.[62] One could take the view that a business like Curves, a women-only gym,[63] should not be

way to guarantee full access and citizenship other than to bar these refusals." *Id.*; *see also* NeJaime & Siegel, *supra* note 8, at 2566–78 (discussing various harms, both physical and psychological, that religious accommodation laws visit on those denied access to goods and services).

[59] *See* Oleske, *Unequal Treatment*, *supra* note 10, at 142–47.

[60] *Id.* at 146.

[61] *See* Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277 (2015) (arguing that corporations, unlike individuals, do not possess individual faith commitments and also noting that recognition of corporate religious beliefs will inevitably undercut the religious rights of employees).

[62] John Briley, *Calculating the Curves*, WASH. POST (Mar. 15, 2003), http://www.washingtonpost.com/wp-dyn/articles/A35340-2005Mar14.html (noting that "Curves gyms are no-frills, women-only facilities").

[63] *See* Karen M. Appleby & Elaine Foster, *Gender and Sport Participation, in* GENDER RELATIONS IN SPORT 12–13 (Emily A. Roper ed., 2013) (discussing the creation of "Curves for Women" gyms in 1992 and the chain's subsequent success and the creation of other women-only exercise and sport facilities, including "in higher education

free to make this choice—that, instead, it must organize as a private club or organization if it wishes to exclude men. This position is at least superficially attractive. After all, suppose a corporation wished to operate "White Power" gyms that would permit only Caucasian persons to become members? Most reasonable people would reject out of hand a fitness club festooned with "whites only" signs.

Curves presents a hard case because gender-based exclusions are not always or inevitably subordinating. Certainly, such classifications can rest on insulting or degrading stereotypes—but the existence of single gender institutions, such as college Greek letter organizations, suggests that there might still be a legitimate role in contemporary society for single-sex environments.

State-sponsored colleges and universities lend significant financial and logistical support to single-sex Greek letter organizations. One could characterize this as unconstitutional state support of discrimination, but I believe that Justice Ruth Bader Ginsburg expressed the better view, when writing for the majority in *United States v. Virginia*. If a state wishes to maintain separate educational programs for men and women because it persuasively claims that significant pedagogical benefits will result, then the Equal Protection Clause requires "substantial equality" in the quality of the programs.[64] The standard of review applied to gender classifications, intermediate scrutiny, also seems to reflect the intuition that gender classifications are not as reliably invidious as racial and religious classifications.[65] Even so, however, any use of gender classifications that is degrading or subordinating will not pass constitutional muster, for a purpose to discriminate is not a legitimate, much less an important, government objective.[66]

As a general matter, discrimination in public places should be regulable. Most, but not all, entities operating in the public marketplace are "public" in character, not "private." As such, they are subject to comprehensive anti-discrimination mandates from the federal, state, or local governments.

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settings where women report feeling more comfortable and free in these settings allowing them to learn at their own pace without fear of criticism").

[64] 518 U.S. 515, 551–55 (1996).

[65] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

[66] *See id.* at 724–26. As Justice O'Connor explained in *Hogan*, "MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job." *Id.* at 729–30. Stereotyping a particular profession is not a legitimate, much less a substantial, government interest. *Id.* at 725 (observing that "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions" and that "if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate").

Moreover, these general principles seem quite suitable for drawing a line of demarcation between permissible forms of accommodation and impermissible encouragements to discriminate. If an entity probably enjoys a freestanding First Amendment right to disregard a nondiscrimination ordinance or statute, a legislature should be quite free to codify an exemption—whether in the anti-discrimination provision itself or in a freestanding "conscience" law. Enacting a law that does nothing more than enforce and protect a constitutionally protected associational interest does not violate the Constitution. The problem, however, is that state laws like Mississippi's H.B. 1523 have a scope of application that grossly outstrips the underlying First Amendment right of association. They extend a right to discriminate that the First Amendment, as applied in *New York State Club Association*, *Rotary*, and *Jaycees*, would not protect of its own force.

The other constitutional defect in the recent "conscience" laws, both as proposed and also as enacted, is that they plainly seek to protect targeted discrimination against only one minority group—members of the LGBT community.[67] More general exemptions might stand a better chance of surviving constitutional review—just as a general state law that removed the power to establish local anti-discrimination policies would have stood a better chance of surviving judicial review in *Romer v. Evans*.[68] Of course, more broadly crafted "conscience" laws are unlikely to be enacted because of the overwhelming consensus that racial, religious, and

[67] *See* Barber v. Bryant, No. 3:16-CV-417-CWR-LRA, 2016 U.S. Dist. LEXIS 86120, at *68 (S.D. Miss. June 30, 2016) ("The deprivation of equal protection of the laws is HB 1523's very essence. It violates the Fourteenth Amendment." (citing United States v. Windsor, 133 S. Ct. 2675, 2693 (2013)).

[68] Colorado's Amendment 2 did not make any generalized alteration in the home rule powers of Colorado cities and counties; instead, it disallowed only local ordinances that proscribed discrimination based on sexual orientation. Romer v. Evans, 517 U.S. 620, 623–24 (1996). As Justice Kennedy explained, "[i]t prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians." *Id.* at 624. Of course, Colorado voters would have been much less likely to enact an ordinance that authorized comprehensive forms of discrimination based on race, sex, religion, national origin, disability, veteran status, and other criteria commonly proscribed in local anti-discrimination ordinances. Laws targeting an unpopular minority are far more likely to secure enactment than laws that seek to authorize comprehensive forms of discrimination in workplaces and businesses. *See id.* at 627 ("Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (observing that laws targeting "discrete and insular minorities" should be subject to "searching judicial inquiry" because of the serious risk that they seek to codify and enforce social prejudice rather than legitimate public policies).

gender-based discrimination by businesses open to the public is unacceptable and wrong.[69]

More broadly crafted state laws, even if capable of enactment, would be preempted by federal laws with respect to race, sex, and religion. The Civil Rights Act of 1964,[70] the Civil Rights Act of 1866,[71] and other federal laws and policies would have a preemptive effect on state laws that attempted to authorize denials of service comprehensively.[72] A state government cannot enact and enforce a law that conflicts with an otherwise valid federal law.[73] Thus, even if more broadly crafted, the enacting body would still know that, in practice, a law's effect would be limited to LGBT persons—rendering the ostensibly "inclusive" license to discriminate highly targeted. Indeed, the interplay of state and federal law make such a law no less targeted than Colorado's Amendment 2.

Moreover, just like Amendment 2, the federal courts will find these ostensibly broader statutes inconsistent with the Equal Protection Clause. After all, the Supreme Court has long held that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[74]

Our constitutional tradition—at least since *Brown*—simply does not embrace the idea that basic civil and political rights may be withheld from unpopular minority groups—even if the antipathy has religiously motivated roots. Indeed, if the Civil Rights Act of 1964 had included a "conscience" exemption for places of public accommodation, then restaurants, hotels, and theaters across the South (and nation) would have

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[69] *See* Oleske, *State Inaction*, *supra* note 8, at 9–11, 45–46.

[70] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

[71] An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication, 14 Stat. 27 (Apr. 9, 1866).

[72] *See* U.S CONST. amend. XIV, § 1; 15 U.S.C. § 1691 (2012); 42 U.S.C. § 3601–31(2012).

[73] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405–06, 432–34 (1819) (invoking the Supremacy Clause of Article VI and invalidating a Maryland state law because it conflicted with a valid federal statute's purposes and objectives).

[74] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); *see also* Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law." (internal quotations and citations omitted)).

remained firmly segregated by race—with the justification shifting from state laws requiring racial segregation to sincerely held religious beliefs that integrated public facilities were displeasing to God and that business owners' rights of conscience should take priority over the ability of African American citizens to eat in restaurants, stay in hotels, or watch motion pictures.

It also bears noting that, in the wider world, constitutional courts have not merely accepted and sustained statutes that protect the dignity of minority persons—they often *require* the enactment of such laws to both prevent such dignitarian harms and provide a sure remedy when they do occur.[75] The idea that a private moral or religious belief would justify a bakery posting a sign saying "We Do Not Serve Jews" would be unthinkable in most of the democratic world. Indeed, in Germany it would constitute a criminal offense.[76] Why then, in the United States, should we be willing to discount to zero the real and powerful psychological harm that a refusal of service imposes on the victim?[77] The answer is quite obvious: We should not.

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[75] *See* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 98–102 (2006) (discussing the German Federal Constitutional Court's interpretation of the Basic Law, Germany's constitution, as imposing affirmative, or positive, legal obligations on the government to secure human rights within German society generally, notably including contexts involving interactions between non-state actors).

[76] *See id.* at 127–30 (discussing Germany's strong commitment to using civil and criminal law to eradicate and punish pro-Nazi and anti-Semitic speech).

[77] *Cf.* LAYCOCK, EMERGING CONFLICTS, *supra* note 30, at 198–99 (advocating the posting of "We Do Not Serve LGBT Persons" signs visible to the public because "[a]n advertising requirement would avoid unfair surprise" and positing that "the benefits [of such a public notice requirement] would outweigh the costs"). By way of contrast, the Fair Housing Act contains an exemption for a landlord who lives in a single housing unit, with no more than four rental units, but expressly *prohibits* advertising residential rental housing by race. Fair Housing Act of 1968 § 803, 42 U.S.C. § 3603(b)(2) (2012); *see also id.* at § 3604(c) (prohibiting discriminatory advertisements for the sale or rental of residential real estate). For instructive discussions of the so-called "Mrs. Murphy" exception to the FHA, see Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 192 (2001); James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 607 (1999). In other words, Congress viewed advertising discriminatory rental properties with racial restrictions as *more* objectionable than the practice of actually using race to screen renters in the first place (at least for a rental property with no more than five living units occupied by the landlord). *See* Schwemm, *supra*, at 192–97. This point of view is entirely understandable; open and notorious forms of discrimination, under the color of law no less, seriously undermine the nation's fundamental commitment to securing equal civil rights for all persons. If a business could legally post a sign stating "No Queers," when it could not legally post an equally noxious sign stating its refusal to serve

Moreover, in some significant and important ways, U.S. law already recognizes that conduct premised on discriminatory motives constitutes a harm not just to the direct victim, but also to other members of the group and to the larger community as a whole. This is precisely why many states and the federal government have laws that enhance the sentence for crimes motivated by invidious forms of animus—so called "hate crimes." Despite the potential chilling effect that enhanced sentencing for hate crimes might place on those who embrace hate-based ideologies, the Supreme Court unanimously sustained the constitutionality of such sentencing enhancements in *Wisconsin v. Mitchell*.[78] A unanimous Supreme Court credited Wisconsin's view that imposing longer sentences for hate-motivated crimes was an appropriate policy because "bias-inspired conduct . . . is thought to inflict greater individual and societal harm."[79]

Of course, a rational business owner will seek to maximize returns on her investment by serving all comers. But, this reflects a classical economics perspective;[80] behavioral economics tells us that a business owner

interracial couples or their families (e.g, "No Racial Mongrels"), a strong signal is sent that hatred of LGBT persons is less objectionable—less odious—than other kinds of prejudice. The Equal Protection Clause prevents government from ratifying or endorsing social prejudice, regardless of its precise motivation. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984). Moreover, in the United States, religion was routinely used to justify not only racial discrimination, but also the institution of human chattel slavery itself. *See* ALFRED BROPHY, UNIVERSITY, COURT, AND SLAVE: PRO-SLAVERY THOUGHT IN SOUTHERN COLLEGES AND COURTS AND THE COMING OF CIVIL WAR 30 (2016). Simply put, if a religious motive or belief does not justify a "conscience" exemption for race-based refusals of service, it should not suffice to justify discrimination against LGBT persons either.

[78] 508 U.S. 476, 486–90 (1993).

[79] *Id.* at 487–88.

[80] *See, e.g.*, RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 171–87 (1995). Professor Epstein argues that anti-discrimination laws impose unjustified costs on society and should be abandoned. *See id.* at 186–87. He also posits that employers who practice invidious forms of discrimination will compete less effectively against employers who hire the best available employees: "Moreover, the employer who sacrifices economic welfare for personal prejudice will pay for her preferences on the bottom line." *Id.* at 176. Such an employer "will sacrifice resources to indulge consumption choices, and will be at a systematic disadvantage relative to employers whose economic motivations are more rational." *Id.* If markets are free and open, problems of invidious discrimination will solve themselves—with world enough, and time. *See id.* at 176–77.

The problem, of course, is that this framing device completely ignores the harm of discrimination on those systematically excluded from employment opportunities because of their race, sex, religion, national origin, disability, or sexual orientation. It also assumes a state of perfect information and fully integrated and competitive markets for goods and services. These conditions might, or might not, exist in the real world. And, again, if discrimination is immoral, a social evil akin to acts of violence, society's net utility might well be enhanced, rather than reduced, by legal

might derive greater utility from discriminating against a particular subset of would-be customers because she subjectively values refusing service to members of minority groups that she dislikes more highly than maximizing the financial returns on her investment in her business. It is also possible, in a community that holds widely shared prejudices and that suffers from wide disparities in economic buying power that closely track race, that a business's economic returns would actually be *enhanced*, rather than *reduced*, if the owner adopts discriminatory practices.[81]

In sum, one need not possess the wisdom of Solomon to distinguish and contrast a grocery store from a church, mosque, or temple. As a general rule, a couple cannot simply present itself to a priest, imam, or rabbi and demand to be married; religious entities maintain rules about access to their religious facilities and rites.

Indeed, even the ability to participate in a religious service or rite may be denied or withheld—for a good reason, a bad reason, or no reason at all. Religious organizations are self-constituted communities of faith;[82] they have a right to exercise substantial autonomy in deciding whom to admit, or exclude, from their membership rolls.[83] This freedom

rules aimed at extirpating it—assuming, of course, that one does not define "utility" solely in terms of wealth maximization. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984). Many legal rules, basic to an Anglo-American system of ordered liberty, such as the guilt beyond reasonable doubt standard that the government must meet to secure a criminal conviction, are probably not "efficient" in the classical economics sense of the term (i.e., they impose more social costs than they save). Even if that were true, it does not seem a particularly compelling reason for abandoning the reasonable doubt standard in favor of a less demanding one. We value the personal liberty of criminal defendants more highly than the social cost of the false negatives that the reasonable doubt standard produces.

[81] For example, in 1940s Jackson, Mississippi, if a restaurant owner operated her restaurant on a racially desegregated basis, her net returns might well fall rather than rise—if white patrons boycotted the establishment precisely because it operated on a racially integrated basis.

[82] *See* CARTER, CULTURE OF DISBELIEF, *supra* note 37, at 40 (arguing that faith communities are "autonomous communities of resistance" and "independent sources of meaning" and, as such, merit the ability to be autonomous and self-governing).

[83] *See* INAZU, *supra* note 37, at 167–76; *see also* CARTER, DISSENT OF THE GOVERNED, *supra* note 23, at 53 (positing that government should respect the ability of "self-constituted communities of faith that it has nurtured" to maintain their beliefs and practices). Professor Inazu argues, with some force, that although "there is much to be said for an antidiscrimination norm and the value of equality that underlies it," we must consider the fact that "our constitutionalism also recognizes values other than equality, including a meaningful pluralism that permits diverse groups to flourish within our polity." INAZU, *supra* note 37, at 175. For the record, I concur with these sentiments and previously have said so in print. *See* Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1243 (2008) ("The whole purpose of judicially enforced human rights, however, is not so much to better secure the rights of popular groups (who can seek relief through legislatures and the democratic

to exclude arises from the right of association—I think it also should be seen as a freestanding free exercise interest.[84] The right to hold a religious belief should encompass the right to participate in religious rites required by those beliefs with co-religionists.

We could consider other organizations as well—and test them for the degree to which they are truly private or public. For example, a New Orleans carnival society that stages a Mardi Gras parade and ball on an annual basis, and does not make invitations to its activities available to the public, and does not make membership available to the general public, can be easily distinguished from a Safeway or Burger King. The sphere of the private certainly includes religious communities—but it is not, or should not be, limited solely to religious communities. Any voluntary association that does not welcome the public, and that exists to promote associational relationships among persons sharing particular backgrounds or characteristics, or ideological objectives that relate to targeted policies of exclusion, should not be subject to mandatory statutory nondiscrimination rules.

The key distinction, however, is the degree to which an organization or entity actually seeks to exclude the general public.[85] To the extent that an entity offers services to the general public, the claim that it is truly private rings hollow. Thus, a bakery or photography studio open to the public stands on very different First Amendment ground than a church or private social club; when you hold yourself out as open to the public, regulations consistent with this voluntary decision are consistent with the reasonable expectations, and voluntary behavior, of the business owners.

The agora, or public market, is created and maintained by the community. It is a *res publica*—a public thing—a kind of commons. Accordingly, the community should be permitted to regulate its use—including the adoption of regulations that relate to the health, safety, and welfare of both workers and customers. And, again, the existing case law makes very clear that government has no general obligation to create faith-based exceptions to neutral laws of general applicability that proscribe invidious forms of discrimination by places of public accommodation.

Moreover, the creation of highly targeted licenses to discriminate against particular minorities is itself an unconstitutional government pol-

process), but rather to ensure that unpopular minorities do not suffer unduly from the caprice of democratically elected governmental officials.").

[84] It could also, as Professor Inazu suggests, be characterized as an aspect of the right of assembly. *See* INAZU, *supra* note 37, at 175–78.

[85] *Cf.* Richard A. Epstein, *Public Accommodation Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1282 (2014) (arguing that the First Amendment's implied right of freedom of association should apply fully and directly to businesses open to the public and characterizing public accommodation laws proscribing discrimination by such as businesses as "a giant form of overreach").

icy—government may not withhold the benefit of generally applicable laws from unpopular minority groups (of whatever kind or stripe).[86] As President Barack Obama observed in his second inaugural address, the principle that "all of us are created equal—is the star that guides us still; just as it guided our forebears through Seneca Falls, and Selma, and Stonewall."[87] Targeted discrimination is anathema to our commitment to full and equal citizenship for all persons. Laws like H.B. 1523 are fundamentally inconsistent with the central mandate of the Equal Protection Clause—namely, that government lacks a rational or legitimate interest in codifying animus toward any particular group of citizens.[88]

III. THE NEW RELIGIOUS "CONSCIENCE" LAWS UNCONSTITUTIONALLY ENCOURAGE AND FACILITATE DISCRIMINATION AGAINST SEXUAL MINORITIES AND TRANSGENDER PERSONS

In the 1960s, the Supreme Court developed and deployed a theory of state action that held ostensibly private individuals and entities to be state actors when the government encouraged discriminatory behavior and the individual or entity acted consistently with the state's encouragement. Consistent with this approach, the Supreme Court held that the decision of a private lunch counter, located within an S.H. Kress store in Greenville, South Carolina, to operate on a racially segregated basis constituted state action when it did so, at least in part, to comply with a local ordinance mandating the segregated operation of restaurants.[89]

Chief Justice Earl Warren explained that "[w]hen the State has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it, and, in fact, has removed that decision from the sphere of private choice."[90] Moreover, "these convictions cannot stand, even assuming, as respondent contends, that the manager would have acted as he did independently of the existence of the ordinance."[91] The city's encouragement of private discrimination rendered the private discriminatory conduct state action—even if the store would have operated on a segregated basis in the absence of the city's ordinance mandating segregated public accommodations.[92]

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[86] Romer v. Evans, 517 U.S. 620, 632–34 (1996).

[87] President Barack H. Obama, Inaugural Address (Jan. 21, 2013).

[88] *See* Lawrence v. Texas, 539 U.S. 558, 580–84 (2003) (O'Connor, J., concurring).

[89] *See* Peterson v. City of Greenville, 373 U.S. 244 (1963).

[90] *Id.* at 248.

[91] *Id.*

[92] *Cf. id.* at 252 (Harlan, J., concurring) ("Although the right of a private restaurateur to operate, if he pleases, on a segregated basis is ostensibly left

As a matter of logic, the more obvious equal protection claim would have related to the city ordinance requiring the restaurant to operate on a segregated basis—the ordinance itself straightforwardly violated the Equal Protection Clause and the federal courts could have simply invalidated it.[93] However, invalidating the ordinance would not have resulted in either the overturning of the convictions for trespass or in the desegregation of the Kress lunch counter. Indeed, the store's manager testified that he had two reasons for asking the petitioners to leave—the city ordinance, and "'local customs' of segregation."[94] The city contended that this would have led him to operate on a racially segregated basis and sought the arrest of the civil rights protesters for trespass regardless of the ordinance.[95] Nevertheless, the Supreme Court found the trespass charge against civil rights protesters invalid on equal protection grounds because the city encouraged private parties to racially discriminate, and the Kress store acted consistently with this encouragement.[96]

Reitman v. Mulkey provides another example of the nexus or encouragement theory of state action.[97] California's Proposition 14, a successful ballot measure, repealed two housing non-discrimination laws and replaced them with a constitutional rule that would permit a property owner to refuse to sell or rent property for any reason that the owner deemed sufficient—including overt forms of racial discrimination.[98] The California state courts found that the initiative was designed to encourage and

untouched, the Court in truth effectually deprives him of that right in any State where a law like this Greenville ordinance continues to exist. For a choice that can be enforced only by resort to 'self-help' has certainly become a greatly diluted right, if it has not indeed been totally destroyed."). In Justice Harlan's view, if the Kress store would have operated its lunch counter on a segregated basis regardless of the city ordinance, then state action was absent and the arrests were constitutionally permissible. *See id.* at 251 ("Clearly Kress might have preferred for reasons entirely of its own not to serve meals to Negroes along with whites, and the dispositive question on the issue of state action thus becomes whether such was the case, or whether the ordinance played some part in the Kress decision to segregate. That is a question of fact.").

[93] *Id.* at 247–48 (majority opinion).

[94] *Id.* at 248.

[95] *Id.*

[96] *See id.* (noting that "[t]he Kress management, in deciding to exclude Negroes, did precisely what the city law required" and that "such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators"). Thus, the state's encouragement of the unconstitutional action rendered the private action attributable to the government—even if, in theory, the private business owner might have elected to maintain a policy of racial segregation of the lunch counter without regard to the ordinance.

[97] 387 U.S. 369 (1967).

[98] *See id.* at 374 (noting that Proposition 14 effected the repeal of the Rumford and Unruh Acts, which proscribed racial discrimination in California's housing market).

facilitate private racial discrimination in the residential housing market; the Supreme Court accepted this characterization and, accordingly, held that a racially discriminatory refusal to rent an apartment constituted state action sufficient to bring the Fourteenth Amendment into play.[99]

In determining whether a private party's discriminatory action may properly be attributed to the state, a court must "assess the potential impact of official action [to] determin[e] whether the State has significantly involved itself with invidious discriminations."[100] When a state government "significantly encourage[s] and involve[s] the State in private discriminations," the private party's action may be attributed to the state government and the party's discriminatory act subjected to constitutional scrutiny.[101]

To be sure, subsequent state action cases, such as *Flagg Brothers*, make clear that a local, state, or the federal government may create general laws that authorize private self-help without necessarily translating a private entity's behavior into state action.[102] However, a general law or common law rule against trespasses to private property is easily distinguishable from a law that targets trespasses by a particular minority group.[103] A state law that seeks to encourage discriminatory behavior stands on different constitutional ground than a generic law that creates a general right sounding in property, contract, or tort.[104]

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[99] *See id.* at 372–77.

[100] *Id.* at 380.

[101] *Id.* at 381; *see also* Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 320–21 (1995) (discussing the nexus test for state action).

[102] *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 164–66 (1978). Then-Justice William Rehnquist, writing for the majority, characterized New York as having failed to act to limit the common law rights of a bailee to sell goods to satisfy an outstanding debt for storage costs. *See id.* at 165–66. As Justice Rehnquist states the proposition, "the State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in § 7–210 permits but does not compel, to threaten to sell these respondents' belongings." *Id.* at 165. The nexus or encouragement cases do not involve truly neutral state laws or policies, but rather state laws that are designed to push or nudge non-state actors toward unconstitutional behavior. *See* Krotoszynski, *supra* note 101, at 317 n.74.

[103] *See* Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 483 n.20 (1962) (arguing that state action should exist when a state enacts legislation with the purpose and effect of facilitating private discriminatory acts).

[104] *See id.*; *see also* Krotoszynski, *supra* note 101, at 316–17 & 317 nn.73–74. In this sense, then, the federal RFRA and state mini-RFRAs are easily distinguishable from laws like H.B. 1523 precisely because—unlike H.B. 1523—these laws do not encourage highly targeted forms of religiously motivated discrimination against particular minority groups. *See supra* note 17 and accompanying text. Simply put, the federal and state RFRAs were not motivated by a discriminatory purpose and do not, as a general matter, routinely facilitate private discriminatory acts. *See* NeJaime & Siegel, *supra* note 8, at 2520–22 (arguing that "[c]omplicity-based conscience claims

As I have previously observed, "if the state either requires or invites private parties to engage in behavior that the state could not itself undertake, the private party's actions may constitute state action."[105] Consistent with this approach, lower state and federal courts have broadly read *Reitman* to stand for the proposition that when a private actor engages in unconstitutional action at the invitation or encouragement of the government, it engages in state action.[106]

There is more than a little logic to this theory of state action: If the government may not command directly discriminatory behavior, it should not be able to achieve the same result by merely encouraging, rather than commanding, such behavior. In other words, if a particular policy would be unconstitutional if the state pursued it directly, it should be no less unconstitutional because the state cleverly attempts to achieve its unconstitutional objective through a nudge—or shove—rather than a direct order. Constitutional values are undermined in both cases. Moreover, in both instances the government acts with discriminatory purpose and the law at issue produces discriminatory effects.[107]

If the federal courts were to apply this strand of the state action doctrine to so-called state "conscience" laws that insulate businesses from the legal consequences of denying goods or services to LGBT persons, a strong argument exists that private businesses that engage in discrimina-

differ in form" from most run-of-the-mill RFRA cases because complicity claims "focus[] on third parties in ways that the claims in the free exercise cases that RFRA invokes do not").

[105] Krotoszynski, *supra* note 101, at 320.

[106] *See, e.g.*, Alliance for Cmty. Media v. FCC, 10 F.3d 812, 821 (D.C. Cir. 1993), *rev'd in part*, 56 F.3d 105 (D.C. Cir.), *aff'd in part, rev'd in part sub nom.* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727 (1996) (finding that a private cable system operator engaged in state action when it censored public access channels for indecent content incident to discretionary authority that Congress conveyed to cable system operators by statute); Franz v. United States, 707 F.2d 582, 592 (D.C. Cir.), *modified on other grounds*, 712 F.2d 1428 (D.C. Cir. 1983) (finding state action based on a nexus or encouragement where the federal government facilitated Catherine Franz's decision to unlawfully deny visitation rights to her ex-husband, William Franz, and observing that "[t]he nexus is formed principally by the defendants' encouragement and support of Catherine's decision to hide the children from William").

[107] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–66 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976). As a general rule, in order to obtain heightened scrutiny under the Equal Protection Clause, a plaintiff must show that the government acted with discriminatory purpose and that the law in question produces discriminatory effects. *See* Hunter v. Underwood, 471 U.S. 222, 229 (1985) (invalidating an Alabama constitutional provision stripping persons convicted of crimes of their voting rights because the provision was motivated by overt racial animus and had disparate results); Castaneda v. Partida, 430 U.S. 482, 496–99 (1977) (holding that an unexplained statistical disparity may establish the existence of discriminatory intent).

tory action at the encouragement of the state are state actors because of the government's overt encouragement of such action. Given that many of the states adopting such laws strongly resisted recognizing same-sex marriages—and often same-sex families more generally—the move to adopt "conscience" laws reflects an effort to implement by indirect means policies that *Obergefell* has squarely disallowed.[108]

To be clear, I do not suggest that states must adopt comprehensive anti-discrimination laws. However, the new spate of proposed "conscience" laws are clearly distinguishable from ones that do not regulate private discrimination at all. Instead, the so-called "conscience" bills would create general exceptions from otherwise applicable state laws and policies, such as the law of contract, with the aim of facilitating adverse treatment of sexual minorities and transgender persons. Indeed, these proposed laws are simply not meaningfully distinguishable from the kinds of pro-discrimination policies found to create state action in *Reitman* and *Peterson*.

I think the better argument is that laws like H.B. 1523 constitute substantive violations of the Equal Protection Clause and are facially unconstitutional on this basis. Moreover, unlike cases such as *Reitman* and *Peterson*, in which invalidation of the state law would not prevent private discrimination, invalidation of "conscience" laws would reinstate the general fabric of the state's general laws (notably including the law of contract). To be sure, a business owner might still refuse service to LGBT persons, but would have to do so without the benefit of a legal shield for such action that renders nugatory any potentially applicable general state laws and policies that would provide a basis for damages or other kinds of court-ordered relief.

IV. THE PERMISSIBLE CONSTITUTIONAL SCOPE OF MANDATORY NON-DISCRIMINATION LAWS

It bears noting that many states have moved in the opposite direction and, rather than encouraging discrimination against LGBT persons, maintain broadly written anti-discrimination statutes that prohibit discrimination based on sexual orientation or gender identity in places of public accommodation.[109] An important question exists regarding the constitutional validity of such state and local non-discrimination laws when applied to religious entities or persons who claim that their religious or moral beliefs require them to discriminate. To state the question simply: May a state government legally require a business owner to pro-

[108] *See* Oleske, *State Inaction*, *supra* note 8, at 11 n.32 (describing and discussing immediate calls for "conscience" laws in several states after the Supreme Court issued its decision in *Obergefell*).

[109] *See, e.g.*, CAL. BUS. & PROF. CODE § 51 (West 2016); N.Y. EXEC. LAW § 296 (McKinney 2016).

vide goods or services when doing so violates the person's sincerely held religious or moral convictions?

Government may require places of public accommodation to serve all members of the public without regard to race, sex, religion, or sexual orientation. If a particular entity believes that it has a First Amendment right to discriminate, then it must establish that it is not open to the general public and that its reason for existing includes the exclusion of particular kinds of people. Hence, a major corporate law firm could not successfully claim that their right to association included the right to exclude women as partners.[110] Indeed, the Supreme Court found King & Spaulding's efforts to invoke the First Amendment as a shield that protected gender bias utterly and completely without merit.[111] Writing for a unanimous bench, Chief Justice Burger observed that King & Spaulding failed to show that its legitimate expressive and associational interests "would be inhibited by a requirement that it consider petitioner for partnership on her merits" and also that "as we have held in another context, '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.'"[112]

Consistent with this reasoning, a major corporate law firm may be required to refrain from invidious forms of discrimination, notwithstanding the associational nature of a general partnership engaged in the practice of law. I seriously doubt that King & Spaulding would have fared any better before the Supreme Court had it characterized its desire to exclude women from the partnership as relating to sincerely held religious beliefs regarding the appropriate scope of female lawyers in a corporate law firm. Cloaking the desire to discriminate in religious terms should not alter or affect the basic constitutional analysis: Invidious forms of discrimination are unconstitutional when practiced by the government and also against the public policy of the United States when practiced by non-state actors.[113]

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[110] Hishon v. King & Spaulding, 467 U.S. 69, 78–79 (1984).

[111] *See id.* at 78.

[112] *Id.* (citing and quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)) (alteration in original). *Norwood* clearly stands for the proposition that the Equal Protection Clause prohibits states from directing state resources to pervasively discriminatory institutions. *See infra* text and accompanying notes 143–152.

[113] *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983). Indeed, the Supreme Court characterized the government's interest in eradicating racial discrimination as "compelling" and as a "governmental interest [that] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Id.* at 604. At an earlier point in his academic career, Professor Laycock wrote that racial discrimination in the public marketplace should not be excused on religious liberty grounds. *See* Douglas Laycock, *Tax Exemptions for Racially Discriminatory Schools*, 60 TEX. L. REV. 259, 263 (1982) (arguing that a business owner's "objection to racial equality does not entitle him to be excused from these

On the other hand, government may not command that an Imam perform a same-sex marriage in his mosque. If a state law purported to treat a mosque, temple, or church as a place of public accommodation, and required the religious entity to refrain from any form of discrimination based on sex, race, or sexual orientation, such a law would be facially invalid on First Amendment grounds. But, suppose a religious community opens a fast-food restaurant on a busy commercial thoroughfare. May the restaurant refuse to serve infidels? May it require women to cover in order to receive service? Does the fact of religious ownership mean that, even with respect to a commercial enterprise without any obvious religious character, the restaurant may put up a sign saying "No Blacks," "No Jews," or "No Homosexuals," alongside, perhaps, a "No Shirt, No Shoes, No Service" placard?[114]

For example, legally requiring a Roman Catholic priest to officiate at a same-sex wedding, whether in the parish church or elsewhere, is simply not the same thing as requiring an Olan Mills photography studio to agree to photograph a same-sex wedding. An Olan Mills franchise owner has already ceded a tremendous degree of her artistic control in order to obtain and keep her franchise license—thereby to benefit from the branding of her photography services business with a nationally recognized purveyor of photography services. In sum, if a business owner is

obligations; when he participates in government or the secular economy, he must obey the secular rules that apply to all"). Professor Laycock's seeming indifference to discrimination based on sexual orientation is therefore puzzling. To be sure, race in the United States has a particularly fraught history. But, if our goal is to secure equal religious liberty for all, it seems very odd for the state to tolerate discrimination that is religiously motivated if it believes the discrimination to be less serious or opprobrious. The existence or nonexistence of religious exemptions plainly should not turn on the popularity, or unpopularity, of the religious beliefs of a particular sect. To adopt such an approach is to turn the non-discrimination aspect of the Free Exercise Clause on its head. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524–26 (1993). Behaviors motivated by sincere religious beliefs should be entitled to equal respect—or disrespect. *See* Linda C. McClain, *Religious and Political Values in Congruence or Conflict?: On* Smith*,* Bob Jones University*, and* Christian Legal Society, 32 CARDOZO L. REV. 1959, 2007 (2011) (arguing that even if racial discrimination holds a special place because of its deeply rooted nature and connection to the practice of human chattel slavery, the Supreme Court's overall approach to enforcing equal protection values makes it untenable to privilege religiously motivated discrimination against LGBT persons).

[114] *See* LAYCOCK, EMERGING CONFLICTS, *supra* note 30, at 198–201 (arguing that LGBT persons denied goods or services because of their sexual orientation or gender identity should simply seek them elsewhere because "the hardship imposed by refusing to exempt conservative religious business people would far outweigh the hardship to same-sex couples of allowing exemptions"). *But cf.* Chai Feldblum, *Moral Conflict and Conflicting Liberties, in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 123, 153 (Laycock et al. eds., 2008) (arguing that "[i]f I am denied a job, an apartment, a room at a hotel, a table at a restaurant, or a procedure by a doctor because I am a lesbian, that is a deep, intense, and tangible hurt").

willing to comply with corporate regulations to maintain a franchise, she has already ceded considerable artistic autonomy on a voluntary basis. As a general matter, anyone who opens a business that is generally open to the public should be seen as ceding the ability to pick and choose whom they will, and will not, serve.

Despite my skepticism about the constitutional validity of state laws that encourage or invite discrimination against sexual minorities and transgender persons, constitutional limits plainly exist on how far government may go in requiring non-discrimination by non-state actors. In this regard, a more fully developed theory of the "public" and the "private" is needed in order to determine the permissible constitutional scope of such anti-discrimination laws. Even if local, state, and federal governments may constitutionally condition access to the agora on a wide variety of regulations—from licensing to non-discrimination requirements—an important question remains about the outer limits of mandatory non-discrimination policies. The First Amendment provides a shield against the government regulating our most intimate and private social, religious, and political associations.

Professor Stephen Carter has written lucidly about the importance of permitting self-constituted communities of faith to exist freely and to march to the beat of a different drummer from those who embrace mainstream American culture. As he explains it:

> Religions are communities of corporate worship, or, as one might say in this post-modern world, communities of sense and value, groups of believers struggling to come to a common understanding of the world. So when one speaks of autonomy, one is speaking not just of the individual, but also of the group.[115]

Moreover, these "self-constituted communities of meaning" define themselves "according to a set of understandings that might be radically different from those that motivate the larger society in which it is embedded."[116] In his view, "[t]he nation has a long and unhealthy tradition of using its laws of general application to try to remake self-constituted communities of meaning in the model preferred by a larger culture."[117]

It is difficult to contest seriously either Carter's description of faith communities as being situated both within and outside the dominant cultural milieu and also subject to serious pressures to conform their religious beliefs and practices to the prevailing economic, political, and moral views of the day. We should take care, when regulating the public sphere, not to overreach and deny these self-constituted communities of faith their right to adopt and maintain attitudes and viewpoints that many in contemporary society might find troubling—or even flatly mis-

[115] CARTER, CULTURE OF DISBELIEF, *supra* note 37, at 142.

[116] CARTER, DISSENT OF THE GOVERNED, *supra* note 23, at 27.

[117] *Id.* at 56.

taken. If we are truly committed to a meaningful form of freedom of religious belief, the freedom of conscience must encompass the right to hold idiosyncratic—even highly offensive—points of view. However, these self-constituted communities of faith cannot reasonably claim an unlimited ability to inflict harm on innocent third parties who are *not* fellow religious adherents.[118]

In general, to qualify for a First Amendment privilege against compliance with a non-discrimination law, the Supreme Court has focused on whether an organization's size and membership rules demonstrate a commitment to restricting its membership or activities in order to advance an articulable associational interest.[119] Thus, as Justice Byron White observed in *New York State Clubs Association*, "an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion."[120] On the other hand, however, and as Justice Sandra Day O'Connor observed in her concurring opinion in this case, "[p]redominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law."[121] This is because commercial enterprises do not generally seek to exclude potential customers; instead, they generally seek to serve any and all persons who seek to purchase goods or services. The very nature of a commercial enterprise belies any serious claim to either free association or assembly interests.[122]

Moreover, even if a commercial enterprise could successfully invoke the rights of association and assembly to justify discrimination against would-be customers, the Supreme Court, in *Roberts v. U.S. Jaycees*, squarely held that eradicating invidious forms of discrimination constitutes a "compelling" state interest.[123] Writing for the majority, Justice William Brennan, Jr., explained that "[w]e are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have

[118] *See* NeJaime & Siegel, *supra* note 8, at 2519 (noting that complicity or conscience claims are particularly problematic because such claims "are explicitly oriented toward third parties, [and] they present special concerns about third-party harm"); *see also id.* at 2580–86 (discussing the problem of third-party harms associated with both RFRA and non-RFRA religious accommodation claims).

[119] N.Y. State Club Ass'n. v. City of New York, 487 U.S. 1, 12–13 (1988).

[120] *Id.* at 13.

[121] *Id.* at 20 (O'Connor, J., concurring).

[122] *See* INAZU, *supra* note 37, at 13 (arguing that "antidiscrimination norms should typically prevail when applied to commercial entities").

[123] 468 U.S. 609, 628 (1984).

on the male members' associational freedoms."[124] The Supreme Court also found that the burden of requiring the Jaycees to refrain from sex discrimination was "the least restrictive means of achieving its ends,"[125] that the Minnesota anti-discrimination law constituted at most an "incidental abridgment of the Jaycees' protected speech,"[126] an abridgement that was "no greater than is necessary to accomplish the State's legitimate purposes."[127]

This outcome was a function, in part, of the strength of the state's interest in eradicating discrimination in places of public accommodation. Because "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit,"[128] the state may regulate the conduct of organizations like the Jaycees to prohibit intentional forms of discrimination.

Substantive due process also plainly sets limits on the regulatory power of the state with respect to our personal relationships and intimate associations. The state may not proscribe whom a person may marry.[129] Indeed, government may not generally regulate our intimate associations.[130] This constitutional realm of personal autonomy plainly facilitates individual choices that may reflect rather direct forms of intentional discrimination based on categories that trigger heightened scrutiny when used by the government. For example, straight people do not generally have sex with people of their own gender, whereas gay people usually prefer members of their own sex for sexual encounters. Both sets of choices involve exclusions based on sex, yet the power to select sexual partners, using criteria that the government generally may not use with-

[124] *Id.* at 623.

[125] *Id.* at 626.

[126] *Id.* at 628.

[127] *Id.*

[128] *Id.*

[129] Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) (holding that both equal protection and substantive due process principles require the state and federal governments to recognize same-sex marriage and family rights); Turner v. Safley, 482 U.S. 78, 95–96 (1987) (invalidating a Missouri law prohibiting incarcerated persons from marrying because marriage constitutes a fundamental right and many important aspects of the marital relationship "are unaffected by the fact of confinement or the pursuit of legitimate corrections goals"); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

[130] Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that all persons "are entitled to respect for their private lives" and, accordingly, that "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime").

out a special justification, rests at the very heart of the right of privacy that constitutional liberty protects.[131]

The First Amendment also protects freedom of religious belief. Whatever debates may exist regarding the rightness, or wrongness, of *Employment Division v. Smith*,[132] virtually all serious legal academics would readily, and heartily, agree with Justice Robert Jackson's statement of the applicable rule:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[133]

Although often styled as a coerced speech case, one could easily renormalize *Barnette* as being about the freedom of conscience. The same could be said of *Wooley v. Maynard*,[134] a case in which religiously devout citizens covered up with tape New Hampshire's state motto, "Live Free or Die."[135]

James Madison thought religious conscience to be sufficiently important to include the Free Exercise Clause in the Bill of Rights—as well as the Establishment Clause.[136] Indeed, he described the right to "equal rights of conscience" as among "the choicest privileges of the people" and as constituting "great rights" that should be secured against both the

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[131] *See id.* at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

[132] 494 U.S. 872, 879–85, 890 (1990) (holding that rationality review applies to Free Exercise Clause challenges to neutral laws of general applicability and that a plaintiff must show that a facially neutral law was motivated by religiously motivated animus in order to secure heightened scrutiny under the Free Exercise Clause).

[133] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[134] 430 U.S. 705, 714 (1977) (holding that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all").

[135] *Id.* at 707–08 & n.4; *see also id.* at 714–15 (upholding First Amendment challenge to mandatory display of New Hampshire's state motto because "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable").

[136] *See* 1 ANNALS OF CONGRESS 451 (Joseph Gales ed., 1834); *see also* RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 109–10 (2012) (discussing Madison's introduction of the Bill of Rights in the U.S. House of Representatives on June 8, 1789).

federal and state governments.[137] Both clauses exist to limit the legitimate reach of state power into the religious beliefs, and practices, of the American people. A non-discrimination law that attempted to require a religious organization or group act against its beliefs in the context of its religious services and rites would plainly violate the autonomy interest that our Constitution conveys on communities of faith. Accordingly, even the strongest government commitment to gender equality would not be sufficient to force the Roman Catholic Church, against its will, to ordain women as priests. The decision as to who may hold a ministerial office is simply beyond the legitimate reach of state power.

But, suppose a religious entity opens a clothing store. Or a fast food restaurant. May it apply its religious values and teachings with respect to its employment practices? Suppose a religious faith believes gender-integrated workplaces are rife with sin and displeasing to God. Or suppose it believes that God prefers mothers to be full-time caregivers to their children—rather than participate in the workplace? May it refuse to hire any women in consequence of these beliefs at its commercial enterprises? Suppose too the organization takes the view that *all* of its work is motivated by a desire to serve God and advance the tenets of the faith. This is essentially where the point of conflict between religious accommodation and the public market becomes most acute.

There may be a small subset of businesses that are so completely and thoroughly integrated with the religious mission of a church that the church should be able to extend, by analogy, its freedom from direct forms of government regulation that require it to violate the tenets of the faith. For example, a small gift shop, selling devotional items and books related to the faith, located in a cathedral, constitutes a part of the cathedral itself. It is simply not a Barnes & Noble or Amazon equivalent. Moreover, few members of the public seeking the latest Stephen King horror novel are apt to look for such a title in a cathedral gift shop.

Primary, middle, and high schools affiliated with a religious organization also seem like fairly obvious candidates for recognition as extensions of the core faith mission.[138] Most church-sponsored K–12 programs aim to integrate the tenets of the faith comprehensively within and across

[137] 1 ANNALS OF CONGRESS, *supra* note 136, at 452–53. Madison explained his effort to amend the federal Constitution to protect the rights of trial by jury, a free press, and liberty of conscience against the state governments, as well as the federal government, as arising from his fear that "there is more danger of those powers being abused by the State Governments than by the Government of the United States." *Id.* at 458. Madison specifically reiterated the pressing need to prohibit state governments from "violat[ing] the equal right of conscience." *Id.* at 452.

[138] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 177 (2012).

the curriculum.[139] To be sure, a class on physics or biology is not an exercise in the Catechism. Yet, it would require a kind of willful blindness not to recognize that the very existence of the school relates to an effort to inculcate and advance the teachings of the faith in younger adherents. If a church-related primary, middle, or secondary school wishes to employ discriminatory criteria in selecting the staff (across the board), it should be able to do so. Once again, a parent seeking educational services for a child, or a teacher seeking employment, is unlikely to present herself at a Madrassa if she is not an adherent of Islam. And, if she is an adherent of Islam, facing religious or gender-based requirements for employment will hardly be surprising.

There is also less of a dignitarian harm in being rejected when the enterprise at issue is integrated with a community of faith in an obvious and comprehensive fashion. The exclusion relates to the lack of membership within the self-constituted community of faith—the church, temple, or mosque simply does not hold itself out as equally open and available to both believers and non-believers on the same terms; the entity exists in part to permit the faithful to self-organize themselves within the community—as a distinct and separate community of faith.[140]

When a church opens a fast food restaurant, however, that is indistinguishable from any other similar restaurant, the would-be customer has no reason to anticipate that her sex, race, religion, or sexual orientation will have any impact or bearing on her ability to seek and obtain service. Being told "we don't serve your kind" thus represents a kind of rude slap across the face—and without any prior warning. This constitutes a significant dignitarian injury, a kind of psychic assault, which the state, through government regulation, has the legitimate power to prevent and to punish.[141]

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[139] *See id.* at 190–92 (holding that a teacher in a pervasively religious K–12 school is engaged in a ministerial function). Chief Justice John Roberts, Jr., observed that "[t]he [ministerial] exception . . . ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone." *Id.* at 194–95 (quoting Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 119 (1952)).

[140] *See* CARTER, CULTURE OF DISBELIEF, *supra* note 37, at 40, 142–43. Professor Carter strongly argues that government should respect the ability of "self-constituted communities of faith that it has nurtured" to maintain their distinctive beliefs and practices—even if those beliefs and practices conflict with the prevailing economic, political, and moral sentiments of the larger body politic. CARTER, DISSENT OF THE GOVERNED, *supra* note 23, at 53.

[141] Let me hasten to add that the owners of private businesses should be free to advance or oppose whatever religiously motivated beliefs and policies that they think best. For example, Chick-fil-A's ownership has achieved some notoriety over its strong opposition to same-sex marriage. *See* Timothy Egan, *Conscience of a Corporation*, N.Y. TIMES (Apr. 3, 2015), http://nyti.ms/1MJrdBT (noting that Chick-fil-A has a corporate non-discrimination policy with respect to sexual orientation that it adopted "[a]fter

V. GOVERNMENT MAY NOT SUBSIDIZE OR OFFER TARGETED SUPPORT TO PERVASIVELY DISCRIMINATORY ENTERPRISES

To what extent may government offer targeted subsidies to religious organizations that engage in religiously motivated discrimination that the state itself may not embrace or advance? At least arguably, a state government should not be any more free to indirectly support private, religiously motivated discrimination (of whatever stripe) than it would be to legislate directly to command such discrimination. What's more, the Supreme Court clearly embraced this logic in the 1970s in the context of targeted aid to pervasively segregated private K–12 schools—schools organized in order to permit white parents to send their offspring to all-white private, often pervasively sectarian ("Christian"), segregated academies.

The government may not do indirectly that which it may not do directly.[142] Accordingly, in thinking about government contracting and sub-

condemning same-sex marriage and becoming a culture-war battleground"). Under the First Amendment, Chick-fil-A's owners have an absolute right to enter the marketplace of ideas and advocate for public policies that are consistent with their religious beliefs. What they do not have a legal, or constitutional, right to do is to pervasively discriminate against sexual minorities in the operation of their fast food restaurants. It bears noting that, to the best of my knowledge, there are no reported incidents of Chick-fil-A seeking to discriminate against LGBT customers or employees. *See id.* We should all readily recognize that non-discrimination laws do not require business owners to be neutral in matters of public policy—whether or not advocacy has a religious or secular basis. Provided that a business owner complies with applicable non-discrimination laws, they are constitutionally entitled to be zealous advocates for policies that anti-discrimination laws proscribe. As Justice Holmes so eloquently observed in *Abrams*,

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Thus, the First Amendment protects the expression and dissemination of political beliefs in if not absolute, then nearly absolute, terms. It does not, however, protect conduct or action based on such beliefs. *See* Corbin, *supra* note 58, at 244–57, 267–74. Thus, a business owner would be quite free to advocate the repeal of the Civil Rights Act of 1964 because she holds a sincere religious belief that integrated public spaces are displeasing to God; she would not, however, be free to operate her business on a racially-segregated basis. *See id.* at 268–71. Simply put, conduct and belief stand on different constitutional ground. *Id.* at 271–74, 298–301.

[142] H.B. 1523 is particularly objectionable in this regard in that it expressly requires the state government to offer targeted forms of support to individuals and businesses that pervasively discriminate against LGBT persons. *See* H.R. 1523, 2016 Leg., Reg. Sess § 4(1)(a)–(g) (Miss. 2016). The law does a remarkably good job of

sidies, if the government itself may not refuse service based on a particular characteristic, such as race or sexual orientation, it may not provide targeted support to an entity that practices discrimination as a tenet of the faith. To permit targeted subsidies to pervasively discriminatory entities is to facilitate government complicity, and responsibility for, discrimination. Religious groups have a right to exclude based on race, sex, religion, disability, or sexual orientation—but they do not have a right to targeted state support for such efforts. Indeed, *Norwood v. Harrison* suggests that targeted support of pervasively discriminatory religiously-affiliated enterprises violates the Equal Protection Clause.[143]

In *Norwood*, the Supreme Court prohibited the State of Mississippi from offering direct support to pervasively discriminatory private schools in the form of textbooks.[144] Mississippi maintained a textbook loan program for students in public, parochial, and private schools. Incident to this program, the state regularly loaned textbooks for use at pervasively segregated private schools.[145] Although the three-judge district court considering the constitutional complaint sustained the program against an Equal Protection Clause challenge,[146] the Supreme Court unanimously reversed.[147]

In finding that Mississippi's practice of loaning textbooks to students for use in pervasively segregated private schools violated the Equal Protection Clause, Chief Justice Burger explained that even if "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment," such discrimination "has never been accorded affirmative constitutional protections."[148] Moreover, "although the Constitution does not proscribe private bias, it places no value on discrimination . . . ."[149]

If the contemporary Supreme Court remains committed to the principles of *Norwood*, then it would necessarily follow that states may not provide targeted support to pervasively discriminatory businesses—even if one could envision a viable First Amendment free association claim by a business open to the public that encompassed a right to refuse service to members of particular minority communities. To state the point more directly, even if government may not constitutionally prohibit invidious forms of discrimination by private individuals and truly private associations, it may not lend them targeted support.

giving private businesses in Mississippi a near-total license to discriminate against sexual minorities and transgender persons.

[143] 413 U.S. 455 (1973).

[144] *Id.* at 463–69.

[145] *See id.* at 459–60.

[146] *Id.* at 460–61.

[147] *Id.* at 471.

[148] *Id.* at 470.

[149] *Id.* at 469.

As Chief Justice Burger noted in *Norwood*, "Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'"[150] Of course, pervasively discriminatory organizations and groups are entitled to the benefit of general state-supported services, such as access to public utilities (water, sewer service, and trash collection), as well as to police and fire protection.[151] The question in any given case turns on whether the state has granted itself a monopoly over a particular good or service or, on the other hand, whether the particular good or service is readily available "on the open market."[152]

My point here is that, in some ways, enacting laws that enable religiously motivated organizations, including businesses, to engage in targeted forms of discrimination constitutes something of a double-edged sword. To be sure, mini-RFRAs or "conscience" laws like Mississippi's H.B. 1523 immunize religiously motivated discriminatory behavior. To the extent that these laws facilitate religiously motivated conduct that might otherwise engender legal liability—for example, a civil action for breach of contract—they empower people of faith to comport their business practices with the dictates of their faith. On the other hand, when a business proprietor festoons her store with "We Don't Serve Homosexuals" signs, as Professor Laycock has suggested, in order to avoid disappointment by would-be homosexual customers,[153] the state, as a matter of

[150] *Id.* at 465 (citing Lee v. Macon Cty. Bd. of Educ., 267 F. Supp. 458, 475–76 (M.D. Ala. 1967) (alteration in original)).

[151] *Id.*

[152] *Id.*

[153] LAYCOCK, EMERGING CONFLICTS, *supra* note 30, at 198–200 (proposing, evidently seriously, that business owners who do not wish to provides goods or services to homosexuals should post public signs so stating and blithely noting that "the stream of commerce might be sprinkled with public notices of discriminatory intent"). Professor Laycock unironically observes that "[i]n more traditional communities, same-sex couples planning a wedding might be forced to pick and choose their merchants carefully, like black families driving across the South a half century ago." *Id.* at 200. Laycock characterizes the injury that same-sex couples subjected to such "No Queers" signs would suffer as mere "hurt feelings" and suggests that "[h]urt feelings or personal offense are so far not a basis for censorship of ideas in American law." *Id.* at 198. This argument contains two mistakes—one of fact and one of law. The mistake of fact relates to the nature of the core injury: it is not "hurt feelings or personal offense," but rather *conduct*, namely, a denial of access to goods or services available to anyone else. *See* Corbin, *supra* note 58, at 273–74. Thus, when a business owner denies an LGBT person service, she engages in conduct, not just speech. *See id.* at 274 ("In analyzing the conduct versus speech distinction in the context of services provided by businesses open to the public, it would appear that conducting a commercial transaction is ultimately conduct."). Just as the operation of a racially segregated lunch counter in the Jim Crow South involved conduct, not merely speech, even if the policy is aided by a "Whites Only" sign in the front window

well-settled Equal Protection jurisprudence, must disassociate itself with the business.

For example, a state agency should not be permitted to spend state funds at a bakery that refuses service to a same-sex couple seeking a wedding cake. There is no material difference between providing textbooks to a pervasively discriminatory K–12 school and purchasing baked goods from a discriminatory bakery. Accordingly, if so-called "conscience" laws are not unconstitutional because they have the purpose and effect of encouraging private discrimination, individuals and businesses that avail themselves of the protection of those laws may not enjoy direct forms of state support.

VI. CONCLUSION

State laws enacted to facilitate, indeed encourage, discrimination against LGBT persons are not consistent with the imperatives of the Equal Protection Clause—any more than state laws and local ordinances aimed at encouraging and facilitating race-based discrimination survived constitutional scrutiny in the 1960s and 1970s. Accordingly, it seems likely that the federal courts will invalidate laws like Mississippi's noxious H.B. 1523 on the authority of *Obergefell*, *Windsor*, *Lawrence*, and *Romer*.[154] Indeed, as Justice O'Connor argued in her concurring opinion in *Lawrence*, state laws that seek to codify animus against minorities (however defined) do not advance a legitimate government policy and are, accordingly, invalid on equal protection grounds.[155]

(which presumably Professor Laycock thinks would constitute a useful signal to people of color who might otherwise mistakenly seek service at the venue). The mistake of law involves the concept of a pervasively hostile work environment in the context of Title VII, a cause of action that may be established entirely through pure speech, provided that the speech creates a workplace that no reasonable person of color or woman would reasonably tolerate. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64–65 (1986); *see also* CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 29 (1979). To be sure, some libertarian legal academics object to the hostile work environment theory of Title VII liability because it creates civil liability for speech. Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 574–77 (1995). To date, however, the federal courts have shown no interest in embracing this argument and have routinely permitted hostile work environment claims to go forward.

[154] *See* Oleske, *Unequal Treatment*, *supra* note 10, at 143–47 (arguing that targeted exemptions from anti-discrimination laws to facilitate denials of service to LGBT persons would violate the Equal Protection Clause). As Oleske straightforwardly states the proposition, "courts should conclude that carving out exemptions from antidiscrimination laws so as to allow commercial business owners to refuse service to same-sex couples unconstitutionally deprives those couples of equal protection of the laws." *Id.* at 146.

[155] Lawrence v. Texas, 539 U.S. 558, 580 (O'Connor, J., concurring).

If, however, laws that seek to immunize private businesses open to the public from all forms of civil and criminal liability for denying service to LGBT persons are not facially invalid on Equal Protection grounds, the federal courts should hold that the use of such laws by business owners to discriminate against sexual minorities and transgender persons constitutes a form of state action on the nexus or state encouragement theory.[156] Because the state itself may not directly command discrimination against would-be LGBT customers, it may not seek to achieve that same objective indirectly by giving a wink and a nudge to private businesses to engage in such discrimination.[157] The 1960s cases finding that state encouragement of racial discrimination made private businesses—like a Kress lunch counter—state actors, insofar as they acted consistently with the state's invitation, remain good law and should apply with full force to laws like H.B. 1523.

Even if I am incorrect to suppose that laws like H.B. 1523 violate the Equal Protection Clause or transform private businesses into state actors when they deploy such laws as a license to discriminate, the state must avoid supporting in any targeted or direct way any and all businesses that avail themselves of this discretion.[158] Just as Mississippi could not provide free instructional materials to pervasively segregated private schools in the wake of *Brown*,[159] Mississippi may not do business with pervasively discriminatory providers of goods and services without running afoul of the Equal Protection Clause in the wake of *Obergefell*. In this respect, those seeking and availing themselves of conscience-based exemptions should be careful about what they ask for—at least if they wish to do business with the government or enjoy any direct forms of government support.

At the other end of the spectrum, however, advocates of marriage equality and the fair treatment of LGBT persons must recognize that the Constitution protects the ability of citizens to organize themselves into self-constituted communities of faith.[160] The First Amendment rights of association and assembly, as well as the Free Speech and Free Exercise Clauses, create a sphere of collective, private autonomy that the state may not seek to abolish or control. Incident to these rights, both individuals and groups have a right to advocate and practice values that the state itself may not.[161] We maintain a state action doctrine precisely in order to protect these autonomy interests. As I have argued previously, "[t]he

[156] *See* Krotoszynski, *supra* note 101, at 320–21, 339–42.

[157] On the potentially benign uses of government "nudges" to encourage individuals to engage in beneficial behaviors, see RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

[158] *See supra* notes 81–108 and accompanying text.

[159] Norwood v. Harrison, 413 U.S. 455, 469 (1973).

[160] CARTER, DISSENT OF THE GOVERNED, *supra* note 23, at 29, 53–56.

[161] *See id.* at 53–87.

state action doctrine is a necessary analytical construct; it permits courts to hold the government accountable and protects the freedom of individual citizens to make fundamental decisions about their economic, social, religious, and personal relationships."[162]

In particular, government regulation of communities of faith, with respect to the tenets of the faith and how such communities regulate access to their rites and sacraments, presents most serious constitutional issues. To state the matter simply, government has a much firmer constitutional basis for regulating a Taco Bell or Kroger than a church, synagogue, mosque, or temple. The First Amendment protects assembly, association, and free exercise; our society's commitment to securing equality in the agora must not extend beyond the public marketplace into private homes and places of worship.

As readily and emphatically as we should reject demands from businesses open to the public for exemptions from comprehensive antidiscrimination laws, we should no less readily accept and vindicate the claims of private religious organizations to restrict membership in their self-constituted communities to those persons who fully subscribe to their articles of faith and demonstrate this adherence through their lived behavior. However, religious organizations cannot enter the public marketplace as a buyer or seller of general goods and services and plausibly claim that their religious identity provides them with an absolute immunity from neutral laws of general applicability designed to make the agora open and available to all citizens on equal terms. Just as the state may condition the sale of foodstuffs on maintaining sanitary conditions, it may also condition the sale of foodstuffs on agreeing to serve all members of the public.[163]

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[162] Krotoszynski, *supra* note 101, at 346–47; *see also* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."). *But cf.* Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 524–27 (1985) (advocating the abolition of the state action requirement in favor of direct rights balancing when private parties engage in behavior that would be unconstitutional if undertaken by the government).

[163] As Justice Brennan cogently observed, discrimination in places of public accommodation constitutes a serious social evil—an evil akin to acts of violence that the state has a compelling interest in eradicating. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) (analogizing invidious forms of discrimination in places of public accommodation to socially harmful expressive conduct akin to acts of physical violence that enjoy no constitutional protection under the First Amendment); *see also* Corbin, *supra* note 58, at 293–94 (arguing that "anti-discrimination laws can be characterized as regulating conduct," that "free speech challenges to public accommodation laws should be dismissed," and that even if such laws affect speech rather than conduct, they advance a compelling government interest in "equal citizenship and equal dignity").

Although touching on matters of great importance, these problems are not particularly difficult to resolve—provided we have a firm grasp of the public and private sphere and maintain a bright line demarcating the boundary where the private ceases to be sufficiently "private" to justify immunities from otherwise applicable general marketplace regulations. The Supreme Court's existing jurisprudence on the freedom of association provides a useful, and highly suitable, framework for distinguishing the truly private from the truly public. If an entity wishes to invoke the First Amendment as a shield for policies and practices that otherwise would violate civil rights laws that seek to prohibit invidious forms of discrimination, it should take care to ensure that it is sufficiently non-public to justify a constitutional exemption from an otherwise applicable anti-discrimination law.